

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:)
)
Maxton Meat Processors Corp.) Case No. 99-12143C-11G
and)
Hidden Hill Farms of North) Case No. 99-12142C-11G
Carolina, Inc., d/b/a) (Jointly Administered)
Hidden Hill Farms, f/k/a)
Hidden Hill Farms, L.L.C.,)
)
Debtors.)
)

ENTERED

OCT 10 '00

U.S. Bankruptcy Court
Greensboro, NC

CPH

MEMORANDUM OPINION

These cases came before the court on June 13, 2000, for hearing upon an objection by the Unsecured Creditors' Committee to proofs of claim filed on behalf of Wachovia Bank, N.A. (Claim No. 127) and Wachovia Leasing Corporation (Claim No. 129). Thomas W. Waldrep, Jr. and Daniel C. Bruton appeared on behalf of the Unsecured Creditors' Committee; Amos U. Priester, IV and Peter J. Marino appeared on behalf of Wachovia Bank, N.A. and Wachovia Leasing Corporation; and Christine L. Myatt appeared on behalf of the Debtors. Having considered the proofs of claim filed on behalf of Wachovia Bank, N.A. and Wachovia Leasing Corporation, the objection to the Wachovia proofs of claim and the evidence offered by the parties and having heard arguments of counsel for the parties, the court makes the following findings of fact and conclusions of law pursuant to Rules 7052 and 9014 of the Federal

Rules of Bankruptcy Procedure.

JURISDICTION

The court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157, and 1334, and the General Order of Reference entered by the United States District Court for the Middle District of North Carolina on August 15, 1984. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(B) which this court may hear and determine.

PROCEDURAL BACKGROUND

On September 10, 1999, MMP and HHF each filed for relief under Chapter 11 of the Bankruptcy Code. Since filing their petitions, MMP and HHF have continued the operations of their respective businesses as Chapter 11 debtors in possession.

Proof of claim 127 was filed in the MMP case on behalf of Wachovia Bank on January 19, 2000. This claim is in the aggregate amount of \$810,065.73, exclusive of interest and fees, and is based upon loans which Wachovia Bank made to MMP. The claim was filed as being secured by assets of both MMP and HHF pursuant to various security agreements and deeds of trust referred to in the attachments to the proof of claim. According to the proof of claim, the collateral for this indebtedness has a value of \$2,800,000.00.

Proof of claim 129 was filed in the MMP case on behalf of Wachovia Leasing Corporation on January 19, 2000. This claim is in the amount of \$1,284,686.22 and is based upon leases under which Wachovia Leasing leased various Trailmobile trailers to MMP. These leases have been rejected by MMP and the trailers returned to Wachovia Leasing. The proof of claim states that an amendment will be filed after Wachovia Leasing has liquidated the trailers. This claim also was filed as being secured by assets of both MMP and HHF pursuant to instruments referred to in the attachments to the proof of claim. According to the proof of claim, the collateral for this indebtedness has a value of \$2,800,000.00.

On March 24, 2000, the Unsecured Creditors' Committee ("the Committee") in the MMP case filed the objection which is now before the court, objecting to Claim Nos. 127 and 129. The primary issue raised by the objection is the extent to which the claim of Wachovia Leasing is cross-collateralized and secured by the assets of MMP and HHF. The Committee asserts that neither the personal property nor the real property of MMP and HHF secures the Wachovia Leasing indebtedness. The response of Wachovia states that no claim is made by Wachovia that the personal property of MMP and HHF cross collateralizes the Wachovia Leasing indebtedness, but that the Wachovia Leasing indebtedness is secured by the real property

of MMP and HHF pursuant to deed of trust modification agreements which were executed in December of 1998.

FACTS

Maxton Meat Processors Corporation ("MMP") is located in Maxton, North Carolina, and is in the food processing business. MMP mechanically debones chicken, resulting in a product which is a component of processed foods such as hot dogs, corn dogs, bologna and sausages.

Hidden Hills Farms of North Carolina, Inc. ("HHF") also is located in Maxton, North Carolina, and has a division involving the operation of a machine and millwright shop and a cooked-food division which prepares and sells foods such as barbeque for retail and institutional distribution.

The same shareholders control MMP and HHF and the two corporations have identical officers and directors. The two companies also have a joint self-insured medical plan for their employees and HHF has provided services with respect to some of the equipment used by MMP. However, with the exception of loans which were obtained from Wachovia Bank, the two corporations have different creditors.

Commencing in 1995, Wachovia Bank became the primary lender for both MMP and HHF. Various secured loans were made by Wachovia

Bank to both MMP and HHF. Also, commencing in 1996, MMP began leasing trailers from Wachovia Leasing Corporation which were used in the business of MMP.

Between December of 1995 and December of 1998, MMP obtained various loans from Wachovia Bank and had outstanding in December of 1998 a loan with a principal balance of \$124,804.67 and a loan with a principal balance of \$600,000.00. These loans were secured by deeds of trust and security agreements which encumbered all of the real and personal property of MMP. In December of 1998, MMP was in default with respect to these loans.

Between December of 1995 and December of 1998, HHF obtained various loans from Wachovia Bank and had outstanding in December of 1998 a loan with a principal balance of \$129,202.09 which was secured by a deed of trust on HHF's real property and a loan with a principal balance of \$225,000.00 which was secured by a security agreement granting a security interest in HHF's personal property. In December of 1998, HHF was in default with respect to these loans.

Between December of 1995 and December of 1998, Wachovia Leasing leased 15 refrigerated trailers to MMP pursuant to an initial lease and 25 additional refrigerated trailers to MMP pursuant to a second lease. The first lease called for monthly

payments of \$9,526.23 for 72 months and the second lease called for monthly payments of \$15,938.87 for 72 months. In December of 1998, installments totaling \$447,732.81 remained unpaid under the first lease and installments totaling \$796,943.50 remaining unpaid under the second lease.

Prior to December 21, 1998, the liabilities of MMP and HHF to Wachovia Bank were not cross collateralized, i.e., the assets of MMP did not secure the obligations of HHF and the assets of HHF did not secure the obligations of MMP. Further, neither of the Wachovia Leasing leases were secured by any of the assets of either MMP or HHF prior to December 21, 1998.

As a result of the status of the MMP and HHF loans and the fact that such loans were in default, meetings took place during the first part of December, 1998, between representatives of Wachovia Bank and representatives of MMP and HHF. During the course of these meetings a forbearance agreement was negotiated and agreed upon by the parties under which Wachovia Bank and Wachovia Leasing agreed to waive defaults which existed at that time and to forbear exercising rights under conditions which were agreed to by MMP and HHF. A written agreement embodying the agreement of the parties was prepared by counsel for Wachovia Bank and Wachovia Leasing which was signed by the parties on or about

December 21, 1998. A copy of the forbearance agreement is attached to Wachovia Bank's proof of claim as Exhibit O (Proof of Claim No. 127 in Case No. 99-12143). This agreement sets forth in detail the extent of the waiver and forbearance agreed to by Wachovia Bank and Wachovia Leasing and the nature and extent of the terms which MMP and HHF agreed to in order to obtain such waiver and forbearance from Wachovia Bank and Wachovia Leasing.

In light of the dispute regarding whether the parties agreed that the obligations of Wachovia Leasing would be cross-collateralized, it is important to determine how the various parties in interest are identified in the forbearance agreement. This appears in the first paragraph of the agreement which provides that Maxton Meat Processors Corporation is identified as "MMP", that Hidden Hill Farms of North Carolina, Inc. is identified as "HHF", that MMP and HHF together are referred to as "Companies", that Wachovia Bank is referred to as "Lender" and that Wachovia Leasing is referred to as "Lessor". Throughout the forbearance agreement, the parties are identified in this manner.

The subject of cross-collateralization is dealt with specifically in paragraph 8 of the forbearance agreement which is entitled "CROSS-COLLATERALIZATION" and which provides as follows:

provision for the assets of MMP & HHF to cross-collateralize any obligations owed to "Lessor" (Wachovia Leasing).

Modification of the deeds of trust from MMP & HHF is dealt with in paragraph 3 of the forbearance agreement which sets forth the conditions which must be met by MMP and HHF in order to obtain the waiver and forbearance provided for under the forbearance agreement. This paragraph describes the collateral which must be provided by MMP and HHF and includes the following provisions:

(A) The First MMP Deed of Trust, as modified by a Modification Agreement executed and delivered by MMP to Lender providing that the collateral under the First MMP Deed of Trust secures all indebtedness, liabilities and obligations of the Companies to Lender whatsoever, whether existing as of the date hereof as hereafter arising, and whether direct, indirect, absolute or contingent, joint or several, as maker, endorser guarantor, surety or otherwise;

(B) The Second MMP Deed of Trust, as modified by a Modification Agreement executed and delivered by MMP to Lender providing that the collateral under the Second MMP Deed of Trust secures all indebtedness, liabilities and obligations of the Companies to Lender whatsoever, whether existing as of the date hereof as hereafter arising, and whether direct, indirect, absolute or contingent, joint or several, as maker, endorser, guarantor, surety or otherwise; and

(C) The First HHF Loan Deed of Trust, as modified by a Modification Agreement executed and delivered by HHF to Lender providing that

the collateral under the First HHF Loan Deed of Trust secures all indebtedness, liabilities and obligations of the Companies to Lender whatsoever, whether existing as of the date hereof as hereafter arising, and whether direct, indirect, absolute or contingent, joint or several, as maker, endorser, guarantor, surety or otherwise. (Emphasis supplied).

The foregoing provisions require that MMP and HHF modify their existing deeds of trust so that each of the deeds of trust "secures all indebtedness, liabilities and obligations of the Companies [MMP and HHF] to Lender [Wachovia Bank]" Since the assets of MMP did not secure the obligations of HHF and the obligations of HHF did not secure the obligations of MMP prior to December 21, 1998, the effect of the foregoing provisions is to provide for cross-collateralization. However, under the language of the agreement, such cross-collateralization is limited to obligations of MMP and HHF "to Lender". By the definitions contained in the forbearance agreement, as noted earlier, "Lender" refers only to Wachovia Bank and does not include Wachovia Leasing which is referred to separately as "Lessor".

Modification agreements modifying the two MMP deeds of trust and the HHF deeds of trust were prepared by counsel for Wachovia Bank and executed by MMP and HHF, copies of which modification agreements appear as exhibits C, E and L to Wachovia Bank's proof

of claim no. 127. Each of these modification agreements provide that the defined term "Obligations" appearing in the original deed of trust is deleted in its entirety and that the following is substituted in lieu thereof:

("Obligations"): All indebtedness, liabilities and obligations of . . . the "Companies" to Beneficiary or Wachovia Leasing Corp. (the "Lessor") whatsoever, whether existing as of the date hereof or hereafter arising, and whether direct, indirect, absolute or contingent, joint or several, as maker, endorser, guarantor, surety or otherwise (Emphasis supplied).

Under this language the assets of both MMP and HHF cross-collateralize not only the obligations of MMP and HHF to the the Beneficiary named in the deeds of trust, i.e., Wachovia Bank, but also their obligations to Wachovia Leasing, as well. It is this portion of the modification agreements that is challenged by the Committee in its objection.

ANALYSIS

The general rule is that in the absence of anything to indicate a contrary intention, instruments executed at the same time and in the course of the same transaction are regarded as a single instrument and are to be read and construed together and "should be held to make one harmonious whole, if practicable, and not destructive of each other." Lewis v. Nunn, 180 N.C. 159, 164,

104 S.E. 470 (1920). All contemporaneously executed written instruments between the parties, relating to the subject matter of the contract, are to be construed together in determining and effectuating the intention of the parties. See Yates v. Brown, 275 N.C. 634, 170 S.E.2d 477 (1969); Combs v. Combs, 273 N.C. 462, 160 S.E.2d 308 (1968); Sandlin v. Weaver, 240 N.C. 703, 83 S.E.2d 806 (1954). Construing contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining or otherwise affecting the provisions of another, such provisions will be given effect so that the overall intent of the parties may be effectuated. See generally, 17A Am Jur 2d Contracts § 388 (1991).

In the present case it is readily apparent that the forbearance agreement and the modification agreements contain provisions which conflict. As unambiguously described in paragraph 3 of the forbearance agreement, the modification agreements called for under paragraph 3 were to modify the existing deeds of trust by providing that the collateral under each of the deeds of trust would secure the obligations of both MMP and HHF "to Lender", which quite clearly refers only to Wachovia Bank and does not include Wachovia Leasing. Yet, the modification agreements include language purporting to cross-collateralize the Wachovia

Leasing obligations, as well. The modification agreements also conflict with paragraph eight of the forbearance agreement in which MMP and HHF agreed that all collateral under all of the loan documents would secure all obligations of both companies "to Lender", again with no reference to "the Lessor" or Wachovia Leasing. This is a substantial conflict between the forbearance agreement and the modification agreements which cannot be brushed aside as involving only "selected words or phrases, taken out of their context" as suggested by Wachovia in its response to the objection.

The forbearance agreement and the modification agreements are dated December 21, 1998, and apparently were executed contemporaneously. The agreements therefore should be construed together pursuant to the foregoing general rule of construction. Construing the forbearance agreement and the modification agreement together means that the court should give effect to any clause in either document which explains or limits the inconsistent provisions of the two agreements. Such provisions are contained in the forbearance agreement. The first such provision is found in paragraph 9 of the forbearance agreement which is entitled "ORIGINAL PROVISIONS" and which, in pertinent part, provides:

for in the forbearance agreement supports the conclusion that the introduction of other changes in the deeds of trust not expressly provided for in the forbearance agreement (i.e., adding the obligations of Wachovia Leasing to those being cross-collateralized) was not the intent of the parties and should not be effectuated.

The second provision in the forbearance agreement which is pertinent as limiting the effect of the language in the modification agreements is an integration clause found in paragraph 10(b) which provides that the forbearance agreement contains the entire understanding of the parties with respect to the subject matter contained therein. No credible evidence was offered of any intention or agreement by the parties to amend or modify the forbearance agreement by means of the modification agreements or any other written agreements. Both parties, therefore, are bound by paragraph 10(b) in which they mutually agreed that their entire understanding with respect to the subject matter of the forbearance agreement was set forth in the forbearance agreement.

Another general rule of construction is that if a single agreement or multiple agreements being construed together contain provisions which conflict or are inconsistent on their face, an

ambiguity is thereby created. See Fashion House, Inc. v. K Mart Corp., 892 F.2d 1076, 1083 (1st Cir. 1989) ("Contract language is usually considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can support, reasonable difference of opinion as to the meaning of the words employed and obligations undertaken."); In re Navigation Technology Corp., 880 F.2d 1491, 1495 (1st Cir. 1989).

In the present case, to the extent that the conflict between the forbearance agreement and the modification agreements is not completely resolved by the provisions of paragraphs 9 and 10(b) of the forbearance agreement, the agreements must be regarded as ambiguous. If contract terms are ambiguous, extrinsic evidence such as evidence regarding the negotiations between the parties may be introduced to show the intent of the parties and to clarify the ambiguous terms. See Root v. Allstate Insurance Co., 272 N.C. 580, 589, 158 S.E.2d 829, 837 (1967); Goodyear v. Goodyear, 257 N.C. 374, 126 S.E.2d 113 (1962); Windfield Corp. v. McCallum Inspection Co., 18 N.C. App. 168, 174, 196 S.E.2d 607 (1973). In such cases, it is for the trier of fact to determine the meaning of the contract based upon the evidence submitted by the parties. See Cleland v. Children's Home, Inc., 64 N.C. App. 153, 306 S.E.2d 587 (1983).

In the present case both parties offered evidence regarding the negotiations which preceded the preparation and execution of the forbearance agreement and the modification agreements. According to the Committee's evidence, the parties discussed the cross-collateralization of the obligations of MMP and HHF to Wachovia Bank and such cross-collateralization was agreed to by the parties, but there was no discussion about MMP and HHF also cross-collateralizing their obligations to Wachovia Leasing and no intent or agreement to do so. According to the Committee's witness, the forbearance agreement was intended to be the master agreement between the parties and he did not realize that the modification agreement contained the provisions regarding the cross-collateralization of the obligations of Wachovia Leasing and did not intend for the modification agreements to change the provisions of the forbearance agreement.

The witness offered by Wachovia Bank and Wachovia Leasing testified that Wachovia desired to cross-collateralize the obligations of Wachovia Leasing and intended to obtain such cross-collateralization. However, this witness did not offer credible testimony that cross-collateralization of Wachovia Leasing's obligations was ever discussed with MMP or HHF or agreed to by them. The subjective, undisclosed intent of a party is immaterial

to the interpretation of a contract. See Reed, Wible and Brown, Inc. v. Mahogany Run Dev. Corp., 550 F.Supp. 1095, 1099 (D. V.I. 1982) ("It is a basic tenet of contract law that the subjective intent of the parties to a contract is immaterial.").

As the trier of fact in this matter, the court accepts the testimony offered by the Committee as credible and finds that during the negotiations leading to the forbearance agreement and modification agreements there was no discussion about MMP and HHF cross-collateralizing the obligations of Wachovia Leasing, no intent on the part MMP or HHF to do so and no expressed intent on the part of either party to do so.

Another widely accepted principle of contract construction, which is followed in North Carolina, is that an ambiguity in a written contract is to be construed against the party who prepared the instrument. See Yates v. Brown, 275 N.C. 634, 170 S.E.2d 477 (1969); Koppers Co., Inc. v. Chemical Corp., 9 N.C. App. 118, 175 S.E.2d 477 (1970); see generally, 17A Am Jur 2d Contracts § 348 (1991) ("in case of doubt or ambiguity a contract will be construed most strongly against the party who drew or prepared it, or supplied a form for the agreement, or whose attorney prepared it"). This principle is applicable in the present case because it is undisputed that the forbearance agreement and the modification

agreements were prepared by counsel for Wachovia. This means that ambiguity resulting from the inconsistent and conflicting terms of the forbearance agreement and the modification agreements prepared by Wachovia's counsel must be resolved against Wachovia and in favor of MMP and HHF, the other parties to the agreements. Such a construction supports the conclusion that the agreements should be construed as providing cross-collateralization only for the obligations to Wachovia Bank.

Based upon the foregoing findings and conclusions, the court concludes that when the forbearance agreement and modification agreements are construed together, the forbearance agreement is controlling regarding the extent of cross-collateralization agreed upon by the parties. It is apparent from the provisions of paragraphs 9 and 10(a) of the forbearance agreement, as well as the from evidence regarding the intent of the parties, that the modification agreements were attendant to the forbearance agreement, intended to implement the terms and conditions set forth in the forbearance agreement and not to rewrite the forbearance agreement. It is true that clauses in a contract which are inconsistent or in conflict should be reconciled if such can be accomplished by reasonable interpretation. However, if, as in the present case, a provision is utterly irreconcilable and repugnant

to the rest of the contract and to the intent of the parties, such clause may be rejected. See Stanley v. Cox, 253 N.C. 620, 117 S.E. 2d 826 (1961); Jones v. Casualty Co., 140 N.C. 262, 52 S.E. 578 (1905); see generally, 17A Am Jur 2d Contracts §§ 393-394 (1991). Accordingly, pursuant to the provisions of the forbearance agreement, the modified deeds of trust from MMP and HHF cross-collateralize only the obligations of Wachovia Bank.

CONCLUSION

In accordance with the foregoing, an order will be entered contemporaneously with the filing of this memorandum opinion adjudging that the deeds of trust from MMP and HHF attached to proofs of claim nos. 127 and 129, as modified by the modification agreements attached to proofs of claims nos. 127 and 129, do not secure any obligations of MMP and HHF to Wachovia Leasing and sustaining the Committee's objection to proofs of claim nos. 127 and 129 to that extent.

This 10th day of October, 2000.

WILLIAM L. STOCKS

WILLIAM L. STOCKS
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:)
)
Maxton Meat Processors Corp.) Case No. 99-12143C-11G
and)
Hidden Hill Farms of North) Case No. 99-12142C-11G
Carolina, Inc., d/b/a) (Jointly Administered)
Hidden Hill Farms, f/k/a)
Hidden Hill Farms, L.L.C.,)
)
Debtors.)
)

ORDER

In accordance with the memorandum opinion filed contemporaneously herewith, it is ORDERED, ADJUDGED AND DECREED as follows:

(1) The deeds of trust from the Debtors which are attached to proofs of claim nos. 127 and 129, as modified by the modification agreements attached to said proofs of claim, do not secure any obligations of either of the Debtors to Wachovia Leasing Corporation; and

(2) The objection of the Unsecured Creditors' Committee to proofs of claims nos. 127 and 129, filed on behalf of Wachovia Bank, N.A. and Wachovia Leasing Corporation, respectively, is sustained to the extent the Unsecured Creditors' Committee objected to the deeds of trust from the Debtors attached to the proofs of claim, as modified by the modification agreements attached to the

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proofs of claim, securing any obligations of either of the Debtors to Wachovia Leasing Corporation.

This 10th day of October, 2000.

WILLIAM L. STOCKS

WILLIAM L. STOCKS
United States Bankruptcy Judge